Hai Yue Hin v Public Feedmill (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-758 OF 1995
SHAIK DAUD, ABDUL MALEK AHMAD AND DENIS ONG JJCA
8 SEPTEMBER 1997

Civil Procedure *— Costs — Interlocutory proceedings — Whether payable forthwith — Interpretation of phrase 'may, if the court thinks fit require the costs to be paid forthwith' provided in O 59 r 4(1) of the Rules of the High Court 1980 — Whether general rule that, in interlocutory proceedings, costs should only be paid after the conclusion of the proceedings ought to be followed — Rules of the High Court 1980 O 59 r 4(1)*

The plaintiff ('the respondent') filed a summons in chambers for summary judgment against the defendant ('the appellant'). The senior assistant registrar dismissed the application with costs. The respondent then filed a notice of appeal to the judge in chambers which was dismissed with costs. The judge, however, granted leave to the respondent to appeal but no appeal was ever filed. The appellant subsequently filed a notice of taxation of the costs awarded by the senior assistant registrar. At the hearing of the notice, counsel for the respondent argued that the notice of taxation was made pursuant to an interlocutory application in which respect appeal was pending. The senior assistant registrar ordered that the notice of taxation be heard after the conclusion of the proceedings. The appellant appealed to the judge in chambers, who agreed with the senior assistant registrar and dismissed the appeal. The appellant appealed against the decision. The issue before the court was whether, on the proper interpretation of O 59 r 4(1) of the Rules of the High Court 1980, when the court ordered costs to a party in an interlocutory matter, such costs were to be paid forthwith, and not after the conclusion of the proceedings.

Held, dismissing the appeal:

Order 59 r 4(1) indicates that the question of costs is left to the discretion of the court and also provides that the court 'may, if the court thinks fit, require the costs to be paid forthwith'. In interpreting O 59 r 4(1), the operative words must be 'may, if the court thinks fit'. If the judge finds evidence sufficient to justify an order of costs to be paid forthwith, then if he thinks it fit, he would make such an order. In the absence of such an order, it should follow the general rule of interlocutory proceedings and the costs should only be paid after the conclusion of the proceedings. There was no suggestion in this case that the costs were intended to be paid forthwith. Costs should, therefore, be paid only at the conclusion of the action (see pp 733H–I and 734E–F); *Chow Yong Hong v Chow See Lim & Anor* [1959] MLJ 23 and *Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304 followed; *Allied Collection Agencies Ltd v*

Wood & Anor [1981] 3 All ER 176, *Adam & Harvey, Ltd v International Maritime Supplies Co Ltd* [1967] 1 All ER 533 and *East Asiatic Co (M) Bhd v Kilang Papan Aman Sdn Bhd* (Civil Suit No 2157 of 1985) not followed.

[Bahasa Malaysia summary

Plaintif ('penentang') memfailkan saman dalam kamar untuk penghakiman terus terhadap defendan ('perayu'). Penolong kanan pendaftar menolak permohonan dengan kos. Penentang kemudiannya memfailkan notis rayuan kepada hakim dalam kamar yang ditolak dengan kos. Namun demikian, hakim memberikan kebenaran kepada penentang untuk merayu tetapi tiada rayuan difailkan. Perayu kemudiannya memfailkan notis pencukaian atas kos yang diberikan oleh penolong kanan pendaftar. Di pembicaraan notis, peguam penentang menghujahkan bahawa notis pencukaian dibuat menurut suatu permohonan interlokutori yang mana rayuan masih menunggu penyelesaian. Penolong kanan pendaftar memerintahkan bahawa notis pencukaian dibicarakan selepas berakhirnya prosiding. Perayu membuat rayuan kepada hakim dalam kamar, yang bersetuju dengan penolong kanan pendaftar dan menolak rayuan itu. Perayu membuat rayuan terhadap keputusan itu. Isu di hadapan mahkamah adalah sama ada, berdasarkan suatu tafsiran yang wajar atas A 59 k 4(1) Kaedah-Kaedah Mahkamah Tinggi 1980, apabila mahkamah memerintahkan kos kepada suatu pihak dalam perkara interlokutori, kos sedemikian harus dibayar dengan serta merta, dan bukan selepas berakhirnya prosiding.

Diputuskan, menolak rayuan:

Aturan 59 k 4(1) menunjukkan bahawa persoalan kos adalah terpulang kepada budi bicara mahkamah dan juga memperuntukkan bahawa mahkamah 'boleh, jika difikirkan patut oleh mahkamah, menghendaki supaya kos itu dibayar dengan serta-merta'. Dalam mentafsirkan A 59 k 4(1), perkataan-perkataan yang tepat adalah 'boleh, jika difikirkan patut oleh mahkamah'. Jika hakim menjumpai bukti yang mencukupi bagi menjustifikasikan perintah kos dibayar serta merta, maka jika beliau fikirkan ia patut, beliau akan membuat perintah demikian. Dalam ketiadaan perintah begini, ini bermakna rukun am prosiding interlokutori dan kos hanya harus dibayar selepas berakhirnya prosiding. Tiada apa-apa cadangan dalam kes ini bahawa kos akan dibayar dengan serta merta. Oleh itu, kos haruslah dibayar hanya selepas berakhirnya tindakan (lihat ms 733H–I dan 734E–F); *Chow Yong Hong v Chow See Lim & Anor* [1959] MLJ 23 dan *Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304 diikut; *Allied Collection Agencies Ltd v Wood & Anor* [1981] 3 All ER 176, *Adam & Harvey, Ltd v International Maritime Supplies Co Ltd* [1967] 1 All ER 533 dan *East Asiatic Co (M) Bhd v Kilang Papan Aman Sdn Bhd* (Guaman Sivil No 2157 tahun 1985) tidak diikut.]

Notes

For a case on whether costs in interlocutory proceedings are payable forthwith, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 922.

Cases referred to

Adam & Harvey, Ltd v International Maritime Supplies Co Ltd [1967] 1 All ER 533 (not folld)

Allied Collection Agencies Ltd v Wood & Anor [1981] 3 All ER 176 (not folld)

Chow Yong Hong v Chow See Lim & Anor [1959] MLJ 23 (folld)

East Asiatic Co (M) Bhd v Kilang Papan Aman Sdn Bhd (Civil Suit No 2157 of 1985) (not folld)

Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304 (folld)

Legislation referred to

Rules of the High Court O 14, O 59 r 4(1)

Wong Kim Lin (*KL Wong & Lim*) for the appellant.
VS Viswanathan (*TH Su & Co*) for the respondent.

Cur Adv Vult

Shaik Daud JCA (delivering the judgment of the court): On 19 January 1990, the respondent (plaintiff) filed a summons in chambers for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') for their claim against the appellant (defendant). The matter came up for hearing before the senior assistant registrar on 9 April 1992 and the application was dismissed with costs. Thereafter, on 13 April 1992, the respondent filed a notice of appeal to the judge in chambers which appeal was dismissed with costs on 22 February 1994. The learned judge, however, granted leave to the respondent to appeal but no appeal was ever filed. On 18 July 1992, the appellant filed a notice of taxation of the costs awarded by the learned senior assistant registrar on 9 April 1992. At the hearing of the notice in question, on 8 March 1993, learned counsel for the respondent raised a preliminary objection to the effect that the notice of taxation was made pursuant to an interlocutory application and that the appeal in respect of that interlocutory application is pending. The learned senior assistant registrar agreed with the preliminary objection and ordered that the notice of taxation be heard after the conclusion of the proceedings. The appellant being dissatisfied with the said order appealed to the judge in chambers. After hearing arguments, the learned judge agreed with the decision of the learned senior assistant registrar and dismissed the appeal with costs. Hence this appeal to this court.

The issue both in the High Court and this court is in the interpretation of O 59 r 4(1) of the RHC which provides:

> Costs may be dealt with by the court at any stage of the proceedings; or after the conclusion of the proceedings and any order of the court for the

A payment of any costs may, if the court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

Learned counsel for the appellant cited two English authorities in support of her contention that the proper interpretation of O 59 r 4(1) is that when the court ordered costs to a party even in an interlocutory matter, such B costs are to be paid forthwith, and not after the conclusion of the proceedings. The heavy reliance on these two cases is because the English Order which governs this is O 62 r 4(1) which is in pari materia with our O 59 r 4(1). In *Adam & Harvey Ltd v International Maritime Supplies Co. Ltd* [1967] 1 All ER 533, it was held that in an interlocutory matter orders for costs to be taxed made without stating 'forthwith' confers a right to C immediate taxation. In *Allied Collection Agencies Ltd v Wood & Anor* [1981] 3 All ER 176, it was held (at p 176):

> Where on an interlocutory application, the court intends that one party is to have the costs of that application irrespective of the outcome of the substantive action, the usual form of order is 'costs in any event', in which case the D taxation is deferred until the conclusion of the substantive action. The words 'defendant's costs' and the words 'plaintiff's costs', which are only used in exceptional circumstances, have the effect of entitling the party concerned to obtain an immediate taxation.

Learned counsel for the appellant urged upon us to follow these two E English authorities, especially when the English Order on the issue is in pari materia with our O 59 r 4(1). She also cited an unreported decision of Shankar J (as he then was) in *East Asiatic Co (M) Bhd v Kilang Papan Aman Sdn Bhd* in Kuala Lumpur High Court Civil Suit No 2157 of 1985.

That case also concerns the dismissal by the senior assistant registrar of an interlocutory application with costs. When an application for taxation F of the costs came up before the senior assistant registrar and, on an objection by the respondent, the learned senior assistant registrar ordered that the bill should only be taxed at the conclusion of the trial. On appeal, Shankar J (as he then was) following the decisions in *Adam & Harvey Ltd* and *Allied Collection Agencies Ltd* held that:

G Upon consideration of these authorities, I am left in no doubt now that the only interpretation of the registrar's order, 'dismissed with costs' is that the costs were to be taxed and paid forthwith.

On reading of O 59 r 4(1), we find that the intention of this rule is as clear as day. The rule itself indicates that the question of costs is left to the H discretion of the court and also provide that the court 'may, if the court thinks fit require the costs to be paid forthwith'. Surely, these words must mean what they say. If the court thinks it fit, the court itself would order the costs to be paid forthwith and in the absence of such an order, it should follow the general rule of interlocutory proceedings and the costs should only be paid after the conclusion of the proceedings. This interpretation I does not seem to be a novel one, as some 30 years ago Smith J in *Chow Yong Hong v Chow See Lim & Anor* [1959] MLJ 23 held (at p 24) that:

> The proceedings are purely interlocutory and should follow the general rule of interlocutory proceedings and that costs should be settled at the end of the action.

In interpreting O 59 r 4(1), the operative words must be 'may, if the court thinks fit'. If the judge finds evidence sufficient to justify an order of costs to be paid forthwith, then if he thinks it fit, he would make such an order. For instance in dismissing an application for summary judgment under O 14, if there is evidence to suggest that the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle them to unconditional leave to defend, then the judge could and should, in our opinion, order that the costs be paid forthwith. The decision in *Chow Yong Hong* was adopted by Mohamed Dzaiddin J (as he then was) in *Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304. In dismissing an interlocutory application by the defendant, the court ordered costs to the plaintiff without adding the word 'forthwith'. The learned judge held that where the proceedings were purely interlocutory, the general rule was that costs of the proceedings should be settled at the end of the action. The court further ordered that the costs of interlocutory proceedings should only be made payable forthwith or in any event when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct, or the party has taken unnecessary or improper action.

Having given our utmost consideration to the arguments and the authorities cited, we agree and adopt the interpretation given in the two decisions in *Chow Yong Hong* and *Ko Ko Ma Pony Horse Centre*, as being the more proper and true interpretation of O 59 r 4(1). To hold otherwise would make nonsense of the wording of the Order itself which, as stated earlier, is clear as day. It is only when the court thinks it fit to order the costs to be paid by the plaintiff forthwith that it should be so paid, otherwise it should follow the general rule in interlocutory proceedings and be paid only at the conclusion of the action. In the present case, we agree with the decision of the learned judge that nowhere is there any suggestion that the learned senior assistant registrar intended the costs to be paid forthwith. We, therefore, dismiss the appeal with costs and order the deposits to go to the respondent to account for costs.

Appeal dismissed.

Reported by David Lai